



Date: **JUNE 30, 1998**

Case No. 97-INA-416

In the Matter of:

**AA DENTAL LAB**  
Employer,

on behalf of:

**RENATO DE GULA**  
Alien.

Appearance: Walfredo P. Castillo, Esq.

Before: Huddleston, Lawson and Neusner  
Administrative Law Judges

JAMES W. LAWSON  
Administrative Law Judge

## **DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.<sup>1</sup> After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) denied the application, the Employer requested review pursuant to 20 CFR § 656.26.<sup>2</sup>

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

### **THE CO'S DECISION**

Employer seeks to fill the position of Dental Lab Technician with DOT Title Dental Lab Technician, DOT #712.381.018, a wage offer of \$39,150, job duties of:

Makes preliminary impressions for study casts, and occlusal registrations for mounting casts. Pours, trims and polishes study casts, fabricates custom impression trays from preliminary impressions, cleans and polishes removable appliances, and fabricates temporary restorations. Fix prosthesis. (AF 23)

and job requirements of two years of college with a major in Dental Technology and four years of experience in the job offered.

The application was denied by the CO on the basis that the employer's educational requirement was unduly restrictive. The CO also found that four qualified U.S. applicants were unlawfully rejected on the basis of an unlisted job requirement which required that the applicants have experience in working with porcelain. (AF 72-74)

### **ISSUES ON APPEAL**

On appeal, employer seeks review of the contentions, among others, that after amending the experience requirement, employer was ordered by the DOL to run the ad, which employer presumed was approved. (AF 83) As to the grounds of an unlisted job requirement, employer states that the ability to work with porcelain is implied in the job description. (AF 83) Because of the deficiencies found by the CO, employer offers its willingness to readvertise. (AF 82)

### **DISCUSSION**

The appeal has failed to justify reversal of the FD. The CO correctly denied certification on the basis, among others, that 4 applicants were rejected for failure to meet an unstated and unadvertised job requirement, namely inability to work with porcelain. While an employer may contemplate that certain duties specified in its job description may require certain education and/or experience, these requirements must be specified by the employer; rejection of U.S. workers for not meeting unspecified requirements constitutes unlawful rejection of qualified U.S. workers pursuant to Section 656.21(b)(7). *Photo Network*, 89-INA-168 (Feb. 7, 1990) Employer argues on appeal that the job description “fix prosthesis” implies the use of porcelain, but this is based upon the assertion of employer in rebuttal (AF 71) and is not substantiated by any independent documentation. It is well established that bare assertions of employer are not entitled to much weight. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (en banc), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989). Where a fact lends itself to proof by independent documentation, the weight and sufficiency of a party's case is bolstered by such documentation. Here, there is none to support its contention that “fix prosthesis” implies the use of porcelain. On the contrary, the DOT description of job duties for the position involved, Dental Laboratory Technician, does not mention porcelain which is instead involved in the job duties of Dental Ceramist, DOT # 712.381-042. Therefore, if indeed the use of porcelain is required by employer, it should have been specified in the application and advertisement instead of such unstated requirement being used as a basis for disqualifying U.S. job applicants.

Accordingly, the following order will enter.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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James W. Lawson  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will

become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
800 K Street, NW  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.